

Testimony of Attorney Norman Newhall in Opposition to SB368 3-26-2007

I am an attorney actively engaged in trial practice for more than 35 years in Great Falls, Montana. I submit the following testimony in opposition to Senate Bill 368 which seeks to expand the provisions of Sections 50-16-201 MCA et seq. Sections 50-16-201 et seq. provide that information gathered by healthcare facilities under the auspices of quality control is confidential and privileged. Superficially, these laws appear to permit healthcare facilities to gather information with respect to medical practitioners without fear that the information will be used against the healthcare facility at a later date. As a practical matter, the laws protect careless healthcare facilities by permitting them to hide the fact that they have conducted little or no investigation at all.

At §37-3-101 MCA, the Montana legislature has previously recognized that in licensing physicians, it is the public policy of the state to protect the public from "unprofessional, improper, unauthorized, and unqualified practice of medicine . . ." In conformance with this public policy, the Montana Supreme Court has likewise recognized the common law duty of hospitals and other healthcare entities involved in credentialing and/or granting privileges to physicians to "use reasonable care to employ only competent physicians and nurses". *Maki v. Murray Hospital* (1932) 91 Mont. 251, 7 P.2d 228. Persons who place themselves in the hands of such physicians "have a right to rely upon the performance of such duty . . ." *Id.* at 233. Similarly, one who employs a physician has the duty to "use reasonable care in selecting a reasonably skilled physician". *Vesel v. Jardine Mining Company* (1939) 110 Mont. 82, 100 P.2d 75, 80.

I speak from experience in noting that the practical effect of Sections 50-16-201 et seq., and of any expansion of such sections as is proposed under SB368, is to hide from the public the fact that a healthcare facility involved in credentialing, hiring or granting privileges to a physician has conducted little or no investigation into the physician's background before turning the physician loose on unsuspecting patients.

Dr. Thomas Stephenson graduated from medical school in 1962. Until he came to Montana in 1995, he was engaged in a highly specialized practice of cosmetic surgery in Southern California. In 1991, Stephenson was profiled by the Los Angeles Times as a celebrity plastic surgeon "whose breast implant ads featuring bosomy women in negligees run frequently in the Times." During his practice in California, Stephenson was the subject of an investigation by the Federal Drug Enforcement Administration which reported that Stephenson was "a Demerol addict and was known to steal Demerol to satisfy his habit" and also reported that Stephenson had been convicted of drunk driving. Further, during the 1980s, Stephenson was the subject of an accusation by a patient to the California Medical Board alleging malpractice and that Stephenson had rendered treatment while under the influence of Demerol and alcohol. The accusation was withdrawn only after Stephenson agreed to complete the medical board's Diversion Program.

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Stephenson's notoriety increased even more when he began to be regularly sued for malpractice. Stephenson was the defendant in 11 separate claims from 1986 to 1993. The California Board of Medical Examiners examined only four of the claims and found Stephenson to have committed gross negligence, repeated acts of negligence and incompetence in the practice of medicine, and to have engaged in acts involving dishonesty and corruption. Following further proceedings, the California Board added an additional finding that Stephenson had knowingly filed fraudulent insurance billings. Stephenson's California license was revoked, the revocation was stayed and his license was placed "on probation for a period of ten years" under numerous terms and conditions, all of which was effective on April 11, 1994.

Stephenson also had a Florida license. In 1995, Stephenson was charged by the Florida Board with failing to timely report the action of the California Board. The Florida Board found the allegations to be true and Stephenson's Florida license was suspended and placed on probation.

In 1995, Stephenson, without an active medical license, applied to practice medicine in Montana. The Montana Board granted a temporary license while it investigated Stephenson's application for a permanent license. While Stephenson was practicing under the temporary license, Stephenson was hired as a family practitioner by Triangle Healthcare, a Montana medical clinic, and was granted hospital privileges by Liberty County Hospital.

In November 1999, Stephenson, while practicing with Triangle Healthcare, saw my client, Jack Nelson. Stephenson diagnosed a possible aortic aneurysm, a potentially emergent and life threatening condition. The most basic standard of care required that threat of rupture of the aneurysm be immediately measured by an ultrasound exam costing approximately \$40 and which can be conducted in less than five minutes. The ultrasound machine is portable and was immediately available in the same building on the day of the physical exam. Had the procedure been performed, Stephenson would have discovered an urgent condition which was readily repairable, but which required immediate surgical repair prior to rupture.

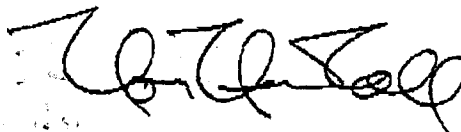
Unfortunately, Stephenson was not even aware of the appropriate diagnostic procedure and dismissed Jack Nelson with a vague instruction to come back the following week for an x-ray. That Stephenson even suggested an x-ray is an indication of just how out of touch Stephenson was with modern practice. Several days later, Jack Nelson died an agonizing, prolonged death when his aneurysm ruptured at home.

Two months after Jack Nelson's death, Stephenson "retired" and, unknown to Jack Nelson's widow, cancelled his claims made malpractice insurance before the widow had discovered Stephenson's negligence.

Through this office, the widow brought a claim against Triangle Healthcare and Liberty County Hospital for negligence in investigating and credentialing Stephenson before hiring him and granting hospital privileges. Since Triangle Healthcare and Liberty County Hospital had the duty under Montana law to exercise ordinary care in the hiring, credentialing and privileging of physicians, Jack Nelson's widow logically sought to discover precisely what Triangle Healthcare and Liberty County Hospital had done to investigate Stephenson prior to hiring and privileging him. A copy of discovery submitted to Triangle Healthcare and Liberty County Hospital is attached to this testimony. Under the provisions of Sections 50-16-201 et seq., both Triangle Healthcare and Liberty County Hospital "stonewalled" Mrs. Nelson's legitimate inquiry thereby posturing as if they had done something to investigate Stephenson, when in fact they had done little or nothing. Subsequent discovery, by means of deposition, disclosed that the person acting as the medical director for Triangle Healthcare and Liberty County Hospital met Dr. Stephenson for lunch on one occasion and the next meeting was at a cocktail reception after Stephenson had already been hired and privileged.

The practical effect of Sections 50-16-201 et seq. is to permit irresponsible healthcare facilities to hide their failure to conduct proper investigation and review. Responsible healthcare providers who properly investigate and credential physicians before permitting them to practice medicine do not need the protections of Sections 50-16-201 et seq. Instead the secrecy encouraged by Sections 50-16-201 et seq. permits the few irresponsible medical providers (the "bad apples") to hide the fact that they have failed to fulfill their legal duty and subverts the public policy previously enunciated by the legislature in §37-3-101 to protect the public from "unprofessional, improper, unauthorized, and unqualified practice of medicine . . ."

SB368 seeks to expand the provisions of Sections 50-16-201 et seq. Under the guise of creating "quality control guidelines" SB 368 actually permits even more medical providers to do nothing to investigate incompetence and then hide such fact from persons who have been injured by incompetent physicians whom they failed to investigate before hiring. The unfortunate, albeit unintended, consequences of Sections 50-16-201 et seq. should not be expanded. I therefore respectfully urge this committee to oppose SB368.



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Attorneys for Defendants Liberty County and
 Liberty County Hospital and Nursing Home, Inc.

MONTANA TWELFTH JUDICIAL DISTRICT COURT, LIBERTY COUNTY

DORIS NELSON, Individually, and as
 Personal Representative of the Estate of Emil
 J. (Jack) Nelson,

Plaintiff,

-vs-

STATE OF MONTANA; LIBERTY COUNTY, a
 Political Subdivision of the State of Montana;
 LIBERTY COUNTY HOSPITAL AND
 NURSING HOME, INC., a Montana
 corporation; THOMAS R. STEPHENSON,
 M.D.; RICHARD S. BUKER, JR., M.D.;
 TRIANGLE HEALTH CARE; TRIANGLE
 HEALTHCARE PLLP; JOHN DOES I-IV,

Defendants.

CAUSE NO. DV-03-3237

DEFENDANTS LIBERTY COUNTY
 AND LIBERTY COUNTY
 HOSPITAL AND NURSING HOME,
 INC.'S RESPONSES TO
 PLAINTIFF'S FIRST DISCOVERY
 REQUESTS (INCLUDING
 REQUESTS FOR ADMISSIONS)

Defendants Liberty County and Liberty County Hospital and Nursing Home, Inc.
 provide the following responses to Plaintiff's First Discovery Requests to Liberty County
 and Liberty County Hospital and Nursing Home, Inc.:

GENERAL OBJECTION

These Defendants object to the instructions and definitions to the extent that the
 preliminary statements in the Plaintiff's First Discovery Requests exceeds the obligation to

respond to discovery as set forth by the Montana Rules of Civil Procedure.

DISCOVERY REQUEST NO. 2001: Produce your complete file and all documents relating to the application of Thomas R. Stephenson for hospital privileges or to be a member of your medical staff at Chester, Montana.

RESPONSE: Objection on the grounds and for the reasons that this discovery request seeks information and documents that are privileged and non-discoverable pursuant to MCA § 50-16-203, MCA § 50-16-205 and MCA § 37-2-201.

Objection is also entered on the grounds and for the reasons that Dr. Thomas R. Stephenson has a legitimate privacy interest in and he has not provided a consent to the release of any documents responsive to this request.

To the extent that this request is not for "data" as defined by MCA § 50-16-201 and is not privileged or confidential as provided by the above-referenced statutes, responsive documents are attached as Exhibit A.

DISCOVERY REQUEST NO. 2002: Produce your complete file and all documents relating, directly or indirectly, to the grant of hospital privileges to Thomas R. Stephenson or the admission of Thomas R. Stephenson as a member of your medical staff.

RESPONSE: Objection on the grounds and for the reasons that this discovery request seeks information and documents that are privileged and non-discoverable pursuant to MCA § 50-16-203, MCA § 50-16-205 and MCA § 37-2-201.

Objection is also entered on the grounds and for the reasons that Dr. Thomas R. Stephenson has a legitimate privacy interest in and he has not provided a consent to the release of any documents responsive to this request.

DISCOVERY REQUEST NO. 2003: Produce your complete file and all documents relating, directly or indirectly, to the efforts of you, or of persons working on your behalf, to credential, investigate or to otherwise determine the qualifications of Thomas R. Stephenson to be granted hospital privileges or to be a member of your medical staff.

RESPONSE: Objection on the grounds and for the reasons that this discovery request seeks information and documents that are privileged and non-discoverable pursuant to MCA § 50-16-203, MCA § 50-16-205 and MCA § 37-2-201.

Objection is also entered on the grounds and for the reasons that Dr. Thomas R. Stephenson has a legitimate privacy interest in and he has not provided a consent to the release of any documents responsive to this request.

DISCOVERY REQUEST NO. 2004: Produce your complete file and all documents relating, directly or indirectly, to the termination of Thomas R. Stephenson's hospital privileges or of his permission to serve as a member of your medical staff.

RESPONSE: Objection on the grounds and for the reasons that this discovery request seeks information and documents that are privileged and non-discoverable pursuant to MCA § 50-16-203, MCA § 50-16-205 and MCA § 37-2-201.

Objection is also entered on the grounds and for the reasons that Dr. Thomas R. Stephenson has a legitimate privacy interest in and he has not provided a consent to the release of any documents responsive to this request.

Without waiving this objection, the termination of Dr. Thomas R. Stephenson's hospital privileges and/or his permission to serve as a member of the medical staff was the result of Dr. Stephenson relocating to another community.